FTC Project No. P094513

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

FEDERAL TRADE COMMISSION

Concerning

INTERAGENCY WORKING GROUP PROPOSAL ON FOOD MARKETING TO CHILDREN

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Federal Trade Commission
Office of the Secretary
Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Interagency Working Group Proposal on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513

Dear Sir or Madam:

The Washington Legal Foundation (WLF) appreciates the opportunity to submit comments to the Federal Trade Commission (FTC) in connection with the Interagency Working Group's Proposal on Food Marketing to Children (Working Group). Specifically, WLF addresses First Amendment and commercial speech issues raised by the Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (the "Guidance").

WLF believes that the regulation of truthful speech contemplated by the Guidance entails a serious infringement on First Amendment speech rights. WLF believes that the proposed infringement is all the more egregious because of the refusal of government officials to acknowledge that they are actually regulating speech. *See, e.g.*, David Vladeck, Director, FTC's Bureau of Competition, "What's on the table," FTC Business Center Blog (July 1, 2011) (available at http://business.ftc.gov/blog/2011/07/whats-table). The FTC needs to understand that when it issues "guidance" to regulated industries regarding what they should be saying, in no meaningful sense of the word can its speech restrictions be deemed "voluntary." Indeed, the

FTC has made clear that it expects the Guidance to result in significant changes in the content of advertising. Some government officials have asserted that the FTC is merely complying with a directive from Congress that it submit a report containing recommendations regarding marketing practices. The wording of the guidance totally belies that assertion. Instead of titling its work product as a "Report to Congress" and including suggestions that Congress might wish to adopt, the Working Group has issued a document that is directed squarely at the American business community and that establishes precise timetables by which time food marketers "should meet the two basic nutrition principles" set out in the Guidance.

As set forth below, the proposed speech restrictions set forth by the Guidance violate the First Amendment because they prohibit advertisements of truthful speech that is not misleading. The Guidance attempts to regulate speech as a first resort, without considering other means that Congress could employ to achieve its stated goal of improving childhood health and reducing childhood obesity. The proposals have a particular health goal in mind, which the Working Group believes can be achieved by restricting speech. Under the First Amendment, however, speech suppression can never be an end to itself. The U.S. Supreme Court has held repeatedly that "if the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Here, however, the Working Group takes the exact opposite approach.

Congress directed the Working Group to "develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diet of children." Omnibus

Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies (hereinafter, the "Explanatory Statement"), at 983-84 . At no time, however, did Congress indicate that those "standards" should entail restrictions on truthful speech. Congress's goal is to promote childhood health. In order to advance that goal and at the same time comply with First Amendment restrictions, the Working Group should adopt recommendations that begin by exploring non-speech measures that directly advance Congress's health goal and recommend restrictions on truthful speech only after *all* non-speech alternatives have been explored and found wanting.

I. *Interests of Washington Legal Foundation*

WLF is a national, nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, a substantial portion of its resources are used in promoting legal policies that are consistent with a free-market economy and in defending the rights of individuals and businesses to go about their affairs without excessive intervention from government regulators. WLF has been especially active in opposing government regulatory actions that infringe on commercial speech rights – both the right of speakers to provide, and the right of consumer to receive, information that is truthful and not misleading.

To that end, WLF has regularly appeared before the U.S. Supreme Court supporting the First Amendment protection of commercial speech. *See, e.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. __, 180 L. Ed. 2d 544 (2011); *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005); *Nike, Inc. v. Kasky*, 539 U.S. 364 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001);

Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF has also appeared in numerous lower federal courts supporting commercial free speech. For example, WLF successfully challenged the constitutionality of certain Food and Drug Administration (FDA) restrictions on the dissemination of truthful information about "off-label" uses of FDA-approved products. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd* (D.C. Cir. 2000).

In addition, WLF has participated in various administrative proceedings in support of expanded First Amendment rights for commercial speakers. *See, e.g.*, FDA Docket No. 2010-N-0136 (May 28, 2010) (response to FDA's request for comments on the implementation of the Family Smoking Prevention and Tobacco Control Act, arguing against speech suppression); FDA Citizen Petition No. 2006P-0319/CPI (August 11, 2006) (documenting First Amendment violations by FDA's Division of Drug Marketing, Advertising and Communications (DDMAC) and calling on DDMAC to conform to constitutional constraints on its activities); TTB Notice No. 73 (January 25, 2008) (response to Alcohol and Tobacco Tax and Trade Bureau's public solicitation for comments regarding alcohol beverage labeling, supporting First Amendment protection of commercial speech).

II. Statutory Background

The Working Group is comprised of representatives from the FTC, FDA, the Centers for Disease Control and Prevention (CDC), and the U.S. Department of Agriculture (USDA). The Working Group's mandate is to study food marketing practices and to "develop recommen-

dations [to Congress] for standards" for marketing of food to children. Explanatory Statement at 983-84. In developing its recommendations, the Working Group is to "consider the positive and negative contributions of nutrients, ingredients, and food . . . to the diet of children" and to consider "evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity" among children who are 17 years old or younger. *Id.* Congress made clear that the Working Group's "recommendations" were to be made *to Congress*, not to the food industry. Moreover, although Congress directed the Working Group to develop "standards for the marketing of food," *id*., nothing in the statute indicated that Congress intended those "standards" to include restrictions on truthful speech or that Congress contemplated that the word "voluntary" would be affixed to official government standards.

The Working Group has issued a document that goes far beyond the recommendations to Congress contemplated by the 2009 legislation that created the Working Group. Instead of making recommendations to Congress, the Guidance makes recommendations directly to the food industry. Thus, after setting out its twin goals of: (A) "encourag[ing] children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet"; and (B) "minimiz[ing] consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight," the Guidance makes the following "recommendations" directly to the food industry:

> The Working Group recommends that, as industry develops new products and reformulates existing products, it should strive to create foods that meet both of these two basic nutritional principles. It further recommends that industry focus these efforts on those categories of foods that are most heavily marketed directly to children, such as breakfast cereals, carbonated beverages, restaurant foods and snack foods. The proposed principles, if fully implemented by industry for these categories, should lead to

> significant improvements in the overall nutritional profile of foods marketed to children.
>
> The Working Group recommends that industry work toward the goal that all foods within the categories most heavily advertised or otherwise marketed directly to children and adolescents would meet the nutrition principles by the year 2016. The Working Group acknowledges that this is an ambitious goal, but believes it is warranted by the urgent need to improve children's diets and health and address the epidemic of childhood obesity.

Guidance at 3. The Working Group states further that its proposals are not intended merely as a recommendation to Congress; rather, they "are intended to guide industry in determining which foods to market to children ages 2-17." *Id.* at 16.

The Working Group refers to the two goals mentioned above as "Principle A" and "Principle B." Pursuant to Principle A, the Guidance recommends that *no* food be marketed to children unless it "make[s] a meaningful contribution to a healthful diet," which the Guidance defines as "contribut[ing] a significant amount of at least one of the following food groups – fruit, vegetable, whole grain, fat-free or low-fat milk products, fish, extra-lean meat or poultry, eggs, nuts and seeds, or beans." *Id.* at 8.[1] Pursuant to Principle B, the Guidance recommends that *no* food be marketed to children if it contains more than specified levels of saturated fat, *trans* fat, added sugars, or sodium. The Guidance proposes adoption of existing FTC standards for defining what constitutes "marketing targeted to children and adolescents." *Id*, at 16-20. Included within that definition would be marketing in media in which children constitute at least a significant minority of viewers (*e.g.*, children ages 2-11 constitute at least 30% of the audience,

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[1] The Guidance adds, "Main dishes would need to include a meaningful contribution from at least two different food groups as part of this contribution and meals would need to include a meaningful contribution from at least three different food groups." *Id.*

or children ages 12-17 constitute at least 20% of the audience).

II. All Advertising, Including Advertising Viewed by Children, Is Protected by the First Amendment

A. Constitutional Framework for Commercial Speech

WLF submits that the Guidance, if promulgated in final form, would impose "voluntary" restrictions on truthful speech that could not withstand scrutiny under First Amendment principles governing commercial free speech. For more than 35 years, the U.S. Supreme Court has recognized that the First Amendment protects even speech that does no more than propose a commercial transaction. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). The Court explained that commercial speech is protected because "[i]t is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable." *Id.* at 765. Commercial speech is of such value, according to the Court, that "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. More recently, the Court has reiterated that "the free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system because it informs the numerous private decisions that drive the system." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (citations omitted).

In *Central Hudson Gas & Elec. Corporation v. Public Service Commission,* the Court articulated a four-part test to determine if certain commercial speech restrictions were constitutionally permissible. 447 U.S. 557 (1980); *see Western States Med. Ctr.*, 535 U.S. at 367. Initially, a court must determine if the commercial speech "concerns unlawful activity or is

misleading."[2] *Western States Med. Ctr.*, 535 U.S. at 367; *see Central Hudson*, 447 U.S. at 566. Next, a court determines "whether the asserted governmental interest is substantial." *Central Hudson*, 447 U.S. at 566. Finally, a court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* The four-part test is no less applicable in assessing the constitutionality of restrictions on speech in the context of food marketing, a lawful activity, than in other contexts; there are no exceptions to the First Amendment based on the nature of the product being sold. *E.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484, 513-14 (1996); *Rubin,* 514 U.S. at 482 n.2 (1995); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 564 (2001).

The Guidelines do not address advertising that concerns unlawful activity (*e.g.*, the sale of products that may not lawfully be sold to children) or that is misleading. Accordingly, any government speech restrictions of the sort contemplated by the Guidelines must pass muster under the second, third, and fourth prongs of the *Central Hudson* test.

Government action can qualify as a speech restriction to which the First Amendment is applicable even if the regulation in question does not affirmatively prohibit any speech but simply imposes a burden on the speech. Thus, for example, the government may not impose special tax burdens on newspapers, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of*

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[2] In order for statement to be false or misleading, the communication must be either inherently misleading or actually misleading, as opposed to being only potentially misleading. *See Peel v. Attorney Registration & Disciplinary Comm'n of Illinois,* 496 U.S. 91, 109-10 (1990).

Revenue, 460 U.S. 575 (1983), nor may it impose financial burdens on criminals seeking to write about their exploits. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Nor may it burden speech of a political candidate by subsidizing the speech of her opponent if the candidate opts to advertise her candidacy more widely than the government deems appropriate. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. __, 180 L. Ed. 2d 664 (2011). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 180 L. Ed. 2d at 556.

Government action can constitute a "burden" on speech even when it takes the form of "voluntary" government speech standards. For example, the Supreme Court invoked the First Amendment to strike down a Rhode Island regulatory scheme under which the State advised publishers that it considered certain books to be obscene. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Even though compliance was "voluntary" and publishers were not bound by the State's obscenity determination, the Court determined that the regulatory scheme imposed an impermissible burden on First Amendment rights because it created fear among publishers that they might be prosecuted if they decided to ignore an obscenity determinations and proceed with publication. *Id*. at 70.

B. The Guidance Burdens Protected Speech and Thus Implicates First Amendment Rights

In Question #30, the Guidance asks, "Do the proposed voluntary principles raise commercial speech issues? In particular, if Congress were to enact them into law, would such a law raise First Amendment concerns?" As should be apparent from the First Amendment principles set forth above, the answers to both questions quite clearly are "yes." Moreover, the

"voluntary principles" raise serious First Amendment concerns even if they are never adopted by Congress but are promulgated by the Working Group in their current form.

The First Amendment is implicated if the Guidance imposes a "burden" on speech, even if it does not impose any direct censorship. As the Supreme Court explained in *Bantam Books*, the best measure of whether government action "burdens" speech is whether the government action causes a reduction in the level of speech. 372 U.S. at 70. That test of whether the government is burdening speech applies even when the government claims that its speech code is "voluntary." *Id.* at 72-73.

The Working Group cannot realistically assert that the Guidance does not impose a burden on truthful speech. Indeed, as we read the Guidance, that is the Working Group's precise purpose: it is hoping to discourage advertising that it disfavors. Unless the FTC, FDA, CDC, and USDA wanted to discourage disfavored advertising, there would be no point in adding their official imprimatur to policy recommendations of the sort at issue.

Moreover, all food manufacturers are heavily regulated by one or more of the federal agencies that are participating in the Working Group. In order for their businesses to survive, they cannot afford to incur the wrath of any one of the agencies. It is absurd to suggest that the advertising of food manufacturers will not be significantly tempered by the knowledge that the regulatory agencies whose approval they require have endorsed "voluntary" advertising guidelines. Accordingly, because the Guidelines would impose a burden on the speech of food manufacturers, they implicate the First Amendment and cannot survive unless they can pass scrutiny under the *Central Hudson* test. *Sorrell,* 180 L. Ed. 2d at 556 ("Lawmakers may no more

silence unwanted speech by burdening its utterance than by censoring its content.").[3]

Question #30 suggests a belief on the part of the Working Group that First Amendment concerns could not possibly arise unless Congress actually enacted the "voluntary" guidelines in a statute. That belief is mistaken; the First Amendment would be implicated by a decision of the Working Group to issue the Guidance in final form without amendment. It is true that the First Amendment would not be implicated if the Guidance were written merely as a set of recommendations for Congress to consider. Federal agencies do not exercise coercive power when they merely recommend to Congress that Congress take certain actions. But the Guidance is not such a document. As noted above, it directs many of its recommendations to the food industry. *See, e.g.,* Guidance at 3. If the Working Group were not intending its recommendations to be directed at the food industry, there would be no need to adopt specific timetables; the only stated justification for timetables is to persuade the industry to act quickly. Thus, even if Congress totally ignores the Guidance, the food industry will be faced with recommendations from regulatory agencies that wield considerable power over them, to "voluntarily" make substantial and immediate changes in their current advertising practices. For all the reasons outlined above, such recommendations undoubtedly constitute a "burden" on constitutionally protected speech. Thus, if the Working Group seeks to avoid First Amendment

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[3] Indeed, *Sorrell* indicates that the *Central Hudson* test represents the *minimum* level of scrutiny that the Guidelines must survive. The Guidelines quite clearly represent both content-based and viewpoint-based speech restrictions; they apply differently based both on the characteristics of the food in question and on what is said about the food. *Sorrell* indicates that such content-based speech restrictions are generally subject to "heightened" First Amendment scrutiny. *Id*. at 557.

litigation over its proposed recommendations, at the very least it should amend the Guidance to make absolutely clear that its recommendations are directed solely to Congress and that it does not expect any "voluntary" compliance unless and until Congress takes action.

C. The Guidance Cannot Pass Muster Under the *Central Hudson* Test

Because the Guidance burdens speech rights, it violates the First Amendment unless, at an absolute minimum, it can pass muster under the *Central Hudson* test. The Working Group has not indicated that it has given any thought to First Amendment considerations. Accordingly, at a minimum, the Working Group should delay putting the Guidance into final form until after it has completed such an analysis.

Under the four-part *Central Hudson* test, the Working Group will be required to demonstrate that it the government interest it is seeking to advance is "substantial," that its speech restrictions "directly advance" that interest, and that the restrictions are "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The available evidence suggests that the federal government would have difficulty meeting *Central Hudson*'s "directly advances" prong. Moreover, there is virtually no evidence suggesting that the government could meet the "not more extensive than is necessary" prong. "[I]f the government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. at 371.

The government seeks to change the dietary habits of children. There is no reason to believe that the only means of doing so is to suppress truthful speech. For example, the Working

Group could recommend adoption of government programs designed to persuade parents to change the food they serve to their children. They could seek to persuade the children themselves. They could provide financial subsidies to manufacturers and food servers who agree to market more healthy foods. Unless and until all such programs have been determined to be inadequate, the Guidelines cannot pass muster under the final prong of the *Central Hudson* test.

III. Conclusion

For the foregoing reasons, WLF respectfully requests that the Working Group withdraw the Guidelines and delay issuing any recommendations that impose burdens on protected speech until after it has undertaken a thorough analysis of the constitutionality of such measures.

Sincerely,

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